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IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 65/2017

HOLDEN AT LUSAKA

BETWEEN:

ELIAS TEMBO T/A CON CLUB **APPELLANT**

AND

DOWNTOWN SHOPPING COMPLEX LIMITED **RESPONDENT**

CORAM: **MCHENGA DJP, MULONGOTI and SICHINGA JJA**

On 24th October, 2017, 23rd January 2018 and 25th April 2018

For the Appellant: *Mr. M.J Katolo of Milner & Paul Legal Practitioners*

For the Respondent: Mr. K. Chenda of Simeza Sangwa & Associates

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J U D G M E N T

MULONGOTI,JA, delivered the Judgment of the Court

Cases referred to:

1. **Bank of Australia v Palmer (1987) AC 540**
2. **Cavmont v Lewis Nathan SCZ Judgment No. 6 of 2016 (Unreported)**
3. **The Attorney General v Marcus Achiume (1983) ZR1 (SC)**
4. **Swift Cargo Services v Lake Petroleum Limited SCZ Judgment No.**

32 of 2016 (Unreported)

5. Nkata and others v The Attorney General (1966) ZR 124 (SC)
6. Attorney General v Kakoma (1975) ZR 212 (SC)
7. York Farms Limited v Cee Cee Freight And Suppliers Limited SCZ Judgment No. 6 of 2017
8. Ginty v Belmont Building Supplies (1959 ALL ER 44
9. Bridget Mutwale v Professional Services Limited (1984) ZR 72 (SC)
10. Communications Authority of Zambia v Vodacom Zambia Limited (2009) 196 (SC)
11. Mutale v Zambia Consolidated Copper Mines(1993-1994) ZR 94 (SC)
12. Wilson Masautso Zulu v. Avondale Housing Project Ltd (1982) ZR 172 (SC)
13. Khalid Mohamed v. The Attorney General (1982) ZR 49 (SC)
14. Y.B and F Transport limited v Supersonic Motors LTD (2000) ZR 32

Legislation referred to:

1. Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia
2. Evidence Act Cap 43 of the Laws of Zambia

The appellant has raised ten grounds of appeal against the Judgment of the High Court dated 18th May, 2017. The facts leading to the appeal are that the appellant, Con Club, entered into a three year lease agreement dated 1st September 2009, with the respondent, Down Town Shopping Mall. The parties agreed for the appellant to rent shop No. F22 Downtown Shopping Mall, from the respondent. The rent was pegged at US $1,229.50 per month payable in advance, with a 4% increment per annum.

The appellant rented the shop for his liquor business. Problems arose when the appellant failed to pay rent. The appellant alleged in his statement of claim and testimony in the lower court, that around November 2010, he had asked the respondent to let him

move to another shop downstairs. The respondent agreed and informed him the monthly rental for the shop downstairs was US $1,250.00. He was also requested to pay security deposit of US $750.00. He made a part payment of the security deposit. However, when he went to collect his stock and fixtures, he found the respondent had locked up the shop. He sued the respondent for immediate payment of K1,140,316.00 the value of the stock (which comprised mainly about 20,000 bottles of wines and spirits), payment of K16,000.00 the value of fixtures and two fridges, and for damages for trespass and conversion of goods.

In its defence, the respondent averred that it allowed the appellant to move downstairs only after he had paid the outstanding rentals. The shop was locked up with his stock inside because he failed to pay the arrears. An inventory of the stock was done prior to locking up the shop. The respondent counter-claimed US $2,713.45 being the unpaid rentals and storage charges from 17th November, 2010.

The trial Judge made a number of findings, of importance to the appeal are the following:

The respondent breached **Section 5 (1) of the Landlord and Tenant (Business Premises) Act**[1] by not giving the appellant notice to quit and or commence proceedings to recover rentals. The respondent acted illegally by entering the shop and locking it up

and was therefore liable in trespass. The Court dismissed the claim for damages for conversion and breach of contract.

The claim for K1,140,316.00 also failed because the defendant disputed the amount of the stock, as 19,158 bottles of wines could not fit in a shop of 35 square metres. The Court found that the appellant failed to disprove this defence. The Court further found that no evidence was led to show that the stock claimed to be in the shop was balanced against the sales. That the appellant should have availed evidence of the sales from May 2009 when he occupied the shop. Accordingly, the Judge agreed with the respondent that the amount of stock was 166 bottles of wine as compiled by the respondent at time of locking up the shop.

The Judge ordered the release of the 166 bottles if they were in a state fit for consumption, if not, the respondent to pay the monetary value of the wines.

The Judge allowed the counter claim for unpaid rentals but for the sum of US $1,211.12 being the original amount shown on the computation done earlier, with interest. The counter claim for storage charges was dismissed on the basis that the respondent did not comply with Section 5 (1) of the Act.

Accordingly, the trial Judge ordered each party to bear own costs.

Dissatisfied, the appellant has raised ten grounds of appeal:

1. ***"The learned trial Judge misdirected herself in law and fact when she held that the documents on pages 101 to 106 and 109 to 129 of the plaintiff's bundle of documents do not constitute sufficient evidence to calculate the amount of liquor that the plaintiff had in stock as at 16th November 2010 when the defendant closed the shop.***
2. ***The finding by the learned trial Judge that the stock sheet compiled by the defendant shows only 166 bottles of wine is at variance with the said stock sheet in that she omitted to add the 21 boxes of wine of unknown quantities appearing on the stock sheet as having been moved from the shop.***
3. ***The learned trial Judge misdirected herself in law and fact when she held that the defendant having disputed that the 19,000 bottles of wine could not fit in the shop whose size was 35 square meters the plaintiff ought to have disproved the defence, in the face of the evidence that DW1 under cross examination conceded that he could not say what space each bottle could have occupied in the shop and the volume of the shop that was occupied.***
4. ***The learned trial Judge misdirected herself in law and fact when she held that no evidence was led by the plaintiff to show that the stock claimed to be in the shop had been balanced against the sales in the face of documentation that out of 47,700 purchases for the period in question, sales amounting to 28,542 bottles were achieved leaving a balance of 19,158 bottles in the shop as at the date of closure.***
5. ***The learned trial Judge misdirected herself in law and fact when she held that the plaintiff ought to have availed records of sales starting from May 2009 when he occupied the shop in order to ascertain the actual amount of stock sold as the issues of sales for***

the period in question did not form part of the matters in controversy requiring determination by the Court.

6. ***The learned trial Judge misdirected herself in law and fact when she failed to enter Judgment in favor of the plaintiff to direct the defendant to release items 1 to 6 on the stock sheet compiled by the defendant.***
7. ***The learned trial Judge having found that the defendant acted illegally when it re-entered the shop ought to have condemned the defendant to costs.***
8. ***The learned trial Judge erred in law and fact when she held that the amount of stock recorded on the stock sheet on page 46 of the defendant's bundle of documents was the amount of stock that was in the shop when neither the appellant nor his agent were present when the said inventory was being conducted by the defendant.***
9. ***The learned trial Judge erred in law and fact when she failed to correctly evaluate the plaintiff's evidence regarding the value of stock in the shop but readily accepted the respondent's evidence on the same.***
10. ***The learned trial Judge in the Court below misdirected herself in law and fact when she entered judgment in favor of the defendant in the sum of US $1,211.12 plus interest on the counter claim in the face of evidence on the record that the defendant closed the shop on 10th August 2010 after which the defendant was precluded from charging any rent as the closure of the shop was found to be illegal by the trial Judge."***

Mr. Katolo, who appeared for the appellant filed detailed heads of argument in support of the appeal. Relying on the definition of documents in **Section 2 of the Evidence Act**[2], as ***"any evidence upon which information is recorded"***, he argued in ground one

that the trial Judge did not analyse the essence of the documents on pages 236-256 of the record of appeal. Counsel equally relied on section 3 of the Evidence Act and the cases of **Bank of Australia v Palmer**[1] and **Cavmont v Lewis Nathan**[2]**,** he submitted that where a document has been produced, it is sufficient on its own and one cannot add anything to prove its contents. The documents at pages 101 to 103 of the record of appeal are a summary of the stock at time of lock up as testified by PW1 which the Judge did not consider properly.

As to ground two, it is counsel's contention that the stock sheet compiled by the respondent revealed 166 bottles of wine which were in the fridges and 21 boxes of wines with unknown quantities in each box, which the trial Judge did not include. It is argued further, that the said stock sheet does not even show who prepared it but has only a verifier and a security guard on duty. The verifier was DW2 who testified to have prepared the stock sheet, contrary to what is shown on the document itself and DW1's testimony. Relying on the popular case of **The Attorney General v Marcus Achiume**[3] and the recent decision of the Supreme Court in **Swift Cargo Services v Lake Petroleum Limited**[4], Counsel urged us to interfere with the finding of fact that there were 166 bottles as the same was not supported by the weight of the evidence.

In ground three we are urged to interfere with the finding that 19,000 bottles of wines could not fit in the shop of 35 square

meters as contended by the respondent and that the appellant ought to have adduced evidence to disprove this. According to counsel, DW1 at page 362 lines 7 to 11 of the Record of Appeal stated that ***"the 20,000 bottles could not fit in the 35 square meters shop he occupied. I can't state what space each bottle occupies. I don't know the volume of the space that was occupied".*** Thus, the Court below erred when she put the onus on the appellant to disprove this fact when the witness did not know anything on the volumes. That the respondent alleged the size of the shop to be 35 square meters and had the burden to prove it, not the appellant.

Regarding grounds four, eight and nine which are against the finding that no evidence was led to show that the stock claimed to be in the shop had been balanced against the sales and that the Court failed to correctly evaluate the evidence, it is submitted that from pages 173 to 223 of the record, are undisputed purchase invoices containing 47,700 units of beverages. At the time of closure of the shop, the appellant had 19,158 units meaning 28,542 were sold as shown on page 230. It is contended that, had the Court appreciated the invoices on record and the stock sheet, she would have come to the inescapable conclusion that at time of closure there were 19,158 units of beverages.

It is counsel's contention that the finding that the stocks were not balanced was also a misapprehension of the facts, as PW1 testified that ***"invoice of 2009 show that I bought the goods. It is not true that***

invoices are accompanied by receipts. I don't have receipts for the purchases. I have produced a sales schedule but no receipts. I issued receipts on sale of goods and kept copies. I have not brought the receipts for the sales. We issue invoices when sales are done..."

Quoting Black's Law Dictionary on the definition of an invoice as:

"(i) An account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars are set forth

(ii) A list or account of goods or merchandise sent or shipped by a merchant to his correspondents, factor, consignee, containing the particular marks of each description of goods, the value, charges and other particulars."

It is argued that the contention by the respondent that invoices ought to be accompanied by receipts flies in the teeth of Black's Law Dictionary. Additionally, PW1's testimony when re-examined was that invoices show that he bought the stock. The purchase invoices at pages 173 to 223 which add up to 47,700 units of beverages and the sales schedules for the period 1st August 2010 to 10th August 2010 at pages 236 to 256 of the record of appeal, were not challenged in anyway.

Therefore, the Court should have evaluated them in a balanced manner, to authenticate the position that they showed the Judge's reflection of the stock at the time. Instead, the Judge believed the

respondent's stock sheet which had serious flaws in that it indicated 21 boxes of wine without specifying the contents or quantities and value, it did not specify the number of bottles in freezer 1 nor the brand and volume and several other flaws as enumerated at pages 30 to 31 of the appellant's heads of argument. Citing **The Attorney General v Marcus Achiume**[3] case, learned Counsel has urged us to interfere as the trial Judge's evaluation of the evidence was unbalanced as only flaws in the appellant's case were highlighted and not those of the respondent.

It was therefore erroneous for the Judge to find that the appellant led no evidence to show that the stock in the shop had been balanced against sales. Reliance was placed on the Supreme Court decisions in **Nkata and others v The Attorney General**[5] to the effect that an appellate court can reverse findings of fact by a trial Judge which are perverse. And in **Attorney General v Kakoma**[6] that a Court is entitled to make findings of fact, where the parties advance directly conflicting stories, on the evidence before it having seen and heard the witnesses. That we should reverse the finding that no evidence was led because it is perverse as it is against the weight of documentary and viva voce evidence on record.

Coming to ground five, it is argued that perusal of the pleadings in the Court below, reveal that neither the appellant nor the respondent pleaded the issue of records of sales. Counsel referred us to cases like **York Farm Limited v Cee Cee Freight And**

Suppliers Limited[7] and **Attorney General v Kakoma**[6] and argued that parties are bound by their pleadings and matters in controversy. The trial Judge therefore erred when she held that the appellant ought to have availed it records of sales from May 2009 when he occupied the shop, for the Court to ascertain the actual amount of stock, as the issue of sales for the period in question did not form part of the matters in controversy.

Ground six was dispensed with.

Turning to ground seven which is against the order that each party bears own costs, it is argued that having found the respondent liable in trespass for illegal entry of the shop and that the respondent should return the two fridges to the appellant, costs should have been awarded to the appellant, as he succeeded on these claims. The claim for restitution of the wines also succeeded. The case of **Ginty v Belmont Building Supplies**[8] was cited as authority that a person cannot derive any advantage from his own wrong. Thus, the appellant partially succeeded in his case against the respondent's wrong doing, costs should be awarded to him.

In ground ten it is learned counsel's contention that the Court below misdirected itself when it found for the respondent for unpaid rentals of US$1,211.12 with interest, having found that the respondent illegally entered the shop. Counsel amplified that the statement of account (page 303 of the record of appeal) from 1st May

2009 to 16th November 2010 and the sales schedules at pages 236 to 256 of the record of appeal demonstrate that the appellant last traded in the shop on 10th August 2010. Therefore, any rentals thereafter were illegal as the appellant did not receive consideration. Page 306 shows receipts and invoices up to 16th November 2010 which the Judge wrongly considered. At page 28 lines 28 to 32 she stated:

> ***"Thus the rentals due from January to November 2010 were $11,440 from May 2009 to December 2009 the rentals due were $8,000 bringing the total rentals due to $19,440. Defendant's Bundle of Documents shows that a total of $14,138.82 was paid in rentals".***

It is clear the Court below acknowledged receipts and invoices up to November 2010, which contradicts her finding that the closure and entry were illegal. Accordingly all payments done after that date (for four months) amount to extortion and should revert to the appellant. The case of **Bridget Mutwale v Professional Services Limited**[9] was relied upon that:

> ***"The Courts have also been sensitive to the fact that none enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefitted from the performance by the other party..."***

In conclusion Mr. Katolo contends that the appellant has discharged his burden on a balance of probability as guided by the authors Phipson & Elliot Manual of the Law of Evidence that:

> ***"The general rule is that the party upon whom persuasive burden of proof rests (i.e usually the plaintiff) is entitled to a verdict if his evidence establishes a preponderance of probability in his favor i.e if he persuades the tribunal of fact that his version of the facts is more probable than that of his opponent."***

Thus his appeal should succeed with costs.

For its part, the respondent filed its heads of argument and Mr. Chenda, who appeared for the respondent, argued grounds one, three, four, five, eight, nine and ten together. It is submitted that these grounds center around seeking to upset findings of fact made by the trial Court with respect to the quantity of the appellant's stock when the shop was closed by the respondent on 10th August 2010.

The Supreme Court decision in the case of **Communications Authority of Zambia v Vodacom Zambia Limited**[10] was cited as authority for when an appellate court can reverse findings of fact by a trial Judge. It is submitted that according to that case and others like **The Attorney General v Marcus Achiume**[3], as a general rule the appellate court will not tamper with the findings of fact by a lower Court except in circumstances where it is shown (in any

alternative) that the findings of fact were perverse; or made in the absence of any relevant evidence; or were based on a misapprehension of the facts; or are such that on a proper view of the evidence, no trial court acting correctly can reasonably make. It is argued, in *casu,* none of the alternatives can be claimed to be present as the trial Judge clearly made a wholistic evaluation of the evidence before arriving at its findings as follows:

(i) "The plaintiff filed sales schedules which reveal that he had 19,158 bottles of assorted liquor when the defendant locked the shop and removed the stock. The stock sheet compiled by the defendant on the other hand shows that only 166 bottles of wine were in the fridges. **The plaintiff relies on the documents on pages 101-103 of the bundle of documents to show the value of the stock. These documents merely list the brand names of the alcohol, the unit price and the total cost. The sales schedule on pages 109-129 of his bundle of documents equally just lists the sales and quantities. This evidence is insufficient to calculate the amount of liquor that he had in stock"** (At page 32 lines 17-26 of the record)

(ii) "On pages 46-96 of the plaintiff's bundle of documents are invoices for the liquor that the plaintiff purchased starting from 29th April 2009 to round about 2nd September 2009. From page 109 to page 129 are sales schedules starting from 1st August 2010 to around 20th August 2010. **The sales are for part of the month of August 2010, yet the invoices are for purchases made from April 2009 to September 2009. The record for the sales are eleven months after the stock was bought"** (At page 33 lines 3-10 of the record)

(iii) **"No evidence was led to show that the stock claimed to be in the shop had been balanced against the sales**. As such I find that the plaintiff has not shown how much of the stock was bought from April

2009 to September 2009 had been sold by the time that the sales schedules on pages 109 to 129 of the plaintiff's bundle of documents were compiled. **In order to ascertain the actual amount of stock sold, records of the sales starting from May 2009 when he occupied the shop should have been availed to the court. As this was not done, I find that the amount of stock as recorded on the stock sheet on page 46 of the defendant's bundle of documents, is the amount of stock that was in the shop."** (At page 33 lines 11-20 of the record)

(with underlining by counsel for emphasis)

It is submitted that the appellant has argued grounds one, three, four, five, eight, nine and ten as if the burden of proof was borne by the respondent. That the appellant simply failed to prove the value of the stock as claimed. He did not provide any record of stock sheet or inventory taken on or about November 2010 nor any pictorial record of the stock. He also did not adduce documentary evidence to show the listing of the alleged stock at the shop and not elsewhere, done around the period of eviction and verified by someone other than himself.

The appellant having failed to discharge the burden of proof, has now undertaken a speculative fishing expedition in his desperate quest to find fault with the findings of the lower court. It is the respondent's prayer that grounds one, three, four, five, eight, nine and ten be dismissed.

Learned Counsel referred us to the stock sheet at page 304 of the record of appeal, in arguing ground two. He contended that the portion of the Judgment which the appellant have appealed against in ground two, reads ***"The plaintiff filed sales schedules which reveal that he had 19,158 bottles of assorted liquor when the defendant locked the shop and removed the stock. The stock sheet compiled by the defendant on the other hand shows that only 166 bottles of wine were in the fridges."*** According to the respondent this was not the *ratio decidendi* but simply a recollection of the competing evidence presented by the parties. Thus, it was grossly misplaced for the appellant to fashion a ground of appeal around it. This is even more apparent when one considers the holding granting the appellant the right to recover not just 166 bottles of wine on the relevant stock sheet but also the 21 boxes of wine without distinction. That the Court ordered the release of the wines which was broad enough to encompass the 166 bottles of wine and 21 boxes of wine, which renders ground two unnecessary and redundant. Furthermore, by raising ground two, the appellant is actually giving credence to the finding that the stock sheet produced by the defendant was an accurate account of the stock at the material time.

In arguing ground seven which is against the order that each party bears own costs, learned counsel placed reliance on the Supreme Court decision in the case of **Mutale v Zambia Consolidated Copper Mines**[11] that the general rule is that a successful party should not be deprived of his costs unless his conduct in the course

of proceedings merits the Court's displeasure or unless his success is more apparent than real. Additionally, that where there is no clear cut victor, the Supreme Court provided guidance in **Y.B and F Transport limited v Supersonic Motors Limited**[12]**:**

> ***"The question should have been "who has won the case?" if the Court considered that the award of limited interest to the defendant meant the defendant had substantially won his counterclaim, then a better result would have been to declare that each side had substantially won their own cases and have ordered each party to bear own costs."***

It is argued, in this case the Court below dismissed all of the appellant's claims save for damages for trespass, while the respondent's counter claim for rentals was allowed though the amount was reduced. The counterclaim for storage charges was dismissed. Therefore, the Court cannot be faulted for ordering each party to bear own costs as the order is consistent with the principles set out in the cases cited and binding on it by the doctrine of *stare decisis.*

It is the respondent's prayer that all the grounds of appeal be dismissed, with costs.

The appellant's counsel then filed his heads of argument in reply. He maintained that at page 32 lines 19 to 20 the trial Judge found as a fact that 166 bottles of wine were in the fridges and ordered that they be released. Thus this cannot, by any stretch of

imagination by the respondent, be taken to mean the order of release was broad enough to encompass the 21 cases of unknown quantities.

We have considered the submissions by counsel and the Judgment appealed against. We note that ground six has been abandoned. All the other grounds of appeal are attacking findings of fact except ground seven. It is trite law, as submitted by both counsel that an appellate Court can only interfere with findings of fact made by a trial Court if they are either perverse, or made in the absence of any relevant evidence or on a misapprehension of the facts or the findings are such that on a proper view of the evidence no trial Court acting reasonably can make. **See Nkata and others v The Attorney General**, *supra.*

We shall deal with grounds one to five, eight and nine simultaneously as they are interlinked. Primarily, the appellant contends that the trial Judge misdirected herself in law and fact, when she held that documents on pages 101 to 106 and 109 to 129 of the plaintiff's bundle of documents (pages 228 to 230 and 236 to 256 of the record of appeal) (which are the closing stock sheet and the sales schedule respectively), did not constitute sufficient evidence to calculate or determine the amount of liquor the plaintiff had in stock as at 16th November, 2010 when the defendant closed the shop. We note that the documents (page 236 to 256 of the record) show the stock of various alcoholic beverages which the

appellant claimed to have had between 1st and 10th August 2010. In agreeing with the trial judge and the respondent, we note that there is no indication or evidence led that this is the stock the appellant actually had as at November 2010 when the shop was closed. Based on this evidence, the trial Judge was on firm ground in holding that there was insufficient evidence to calculate the liquor at the time the shop was closed.

The trial Judge was faced with two conflicting stories by the parties. Based on the evidence before her she accepted the respondent's story as it had compiled an inventory of what was in the shop. DW1 compiled the list with DW2 and DW3. DW3 was a security guard, not in the employ of the respondent. He was in this regard an independent witness. The Court cannot be faulted for accepting the inventory compiled by the respondent. DW1's testimony that they waited for the appellant to collect his goods for three months but he could not be found, was accepted by the Court. The respondent then did an inventory and called witnesses to witness the same and to sign it as did DW2 and DW3.

The Court below had ocular advantage in accessing the credibility of DW1, DW2 and DW3 and attached the relevant weight to their evidence, which as an appellate Court we cannot do. The Judge, as argued by Mr. Chenda, made a wholistic evaluation of the evidence before arriving at its findings.

She reasoned that the documents showing the value of the stock, merely listed the brand names of alcohol, the unit price and the total costs. She observed that the sales schedule equally just lists the sales and quantities.

On the invoices, she found that they were showing purchases from 29th April 2009 to about 2nd September 2009 while the sales schedule from pages 109 to 129 (236 to 256 on the record) are for sales from 1st to around 20th August, 2010. In our view, the Judge was on firm ground when she reasoned that the invoices did not support the sales schedule as the sales are for part of the month of August 2010, yet the invoices are from April 2009 to September 2009, eleven months after the stock was bought. Therefore, she properly concluded that no evidence was led to show that the stock claimed to be in the shop had been balanced against the sales.

Her conclusion that in order to ascertain the amount of stock sold, records of the sales starting from May 2009 when the appellant occupied the shop should have been availed, was supported by evidence and facts before her. This finding cannot be reversed. We find no merit in the arguments that because sales for the period 2009 were not in issue, that information was irrelevant. The Judge properly reasoned that it was required to prove the stock and needless to say the appellant produced 2009 invoices before her.

Her finding that the amount of stock as recorded on the stock sheet/inventory filed by the defendant was the amount of stock in the shop, is not perverse nor made on a misapprehension of the facts. We therefore refuse to interfere with the findings of fact by the trial Judge. It is patently clear that the appellant did not keep proper stock sheets showing daily sales etc. A physical count of what was in the shop, is in this regard, the best evidence of what was in stock, which is what the respondent adduced. We take judicial notice that stock taking is an activity that is regularly undertaken by business houses. The appellant failed to show what was in the shop at the time it was locked up nor any recent stock taking activity. He instead adduced evidence of purchases of 2009. These documents speak to the purchases of 2009 and were not helpful to determine or calculate the actual stock in the shop at the time it was closed.

We note that, the appellant in ground three argues that the trial Judge misdirected herself in law and in fact when she held that the defendant, having disputed that the 19,000 bottles of wine could not fit in the shop whose size was 35 square metres the appellant (P18) ought to have disproved the defence in the face of evidence that DW1 under cross examination conceded that he could not say what space each bottle could have occupied. It is a well established principle that the burden of proof of civil cases rests on the plaintiff on a balance of probability, this principle was stated in **Wilson Masauso Zulu v. Avondale Housing Project Limited**[12].

Additionally, in **Khalid Mohamed v. The Attorney General[13],** the Supreme Court guided that the plaintiff cannot automatically succeed once the defendant's defence fails. Thus, the appellant was supposed to prove that he actually had all the stocks he claims to have had in the shop of that space. DW1 on page 361 of the record of appeal testified that the 19,000 bottles the appellant claimed to have left in stock could not fit in the space owing to the size of the shop. As noted earlier DW3 was an independent witness who witnessed and confirmed the stock in the shop. The appellant did not suggest in any way that the witness was biased.

However, the respondent, as rightly found by the Court below was entitled to raise the defence as it did. It was for the appellant to prove that he had the items in stock as alleged and further that they could fit in a shop of that size. The onus was on him to prove his case whatever could be said of the opponent's case.

The defendant's witness testified that the appellant was nowhere to be found for three months and he cannot blame the defendant that the inventory was done in his absence. We note that the trial Judge evaluated the evidence adduced by the parties fairly such that both failed in some of their claims. We find the appellant's arguments in ground one, three, four, five, eight and nine meritless.

Regarding the 21 boxes of wine, the appellant has raised issue with the inventory in that it just stated 21 boxes of wine without stating the quantities and contents.

We note the respondent's arguments in this regard are an admission that the same were to be released with the 166 bottles of wine. The issue here is more about the quantities and contents of the 21 boxes of wine. The inventory, clearly, shows in case of the coca cola crates that they were 10 big empty ones and 6 small empty ones. This was not so with the 21 boxes of wine.

At trial no evidence was led as to the contents of these 21 boxes. We would therefore refer this issue to the Deputy Registrar for assessment as to the contents and quantities in the 21 boxes of wine. In this respect ground two succeeds.

In light of the foregoing grounds one, three, four, five, eight and nine lack merit and are dismissed. Ground two succeeds as indicated.

Ground seven hinges on costs. It is trite law that costs are in the discretion of the Court and will normally follow the event. However, there are guidelines which Court must follow in exercising that discretion. Essentially, wide though the discretion, it must be judiciously exercised. The appellant contends that since the

respondent acted illegally when it entered the appellant's shop, it ought to have been condemned in costs. The Court below based its decision for ordering each party to bear own costs on the fact that they had both partially succeeded in their respective claims. This is in line with cases like **Y.B and F Transport Limited v. Supersonic Motors Limited**[14] as submitted by the Respondent's counsel. The record shows that the respondent entered the shop believing that they had the right to do so because the appellant left his property for three months and was not reachable. And most importantly had defaulted in his rentals.

The general principle is that costs should follow the event; thus, a successful party should normally not be deprived of his costs. Such a turn of events should have an explanation, for example, if the successful party did something wrong in the action or in the conduct of it. Here, the Judge ordered each party to bear own costs because both partially succeeded in their claims. The Court below cannot be faulted for making the order it did as regards the costs. She properly exercised her discretion.

Therefore, ground seven lacks merit and is dismissed.

In ground ten the appellant states that the trial Judge misdirected herself in law and fact and when she entered judgment in favour of the defendant in the sum of $1,211.12 plus interest on the counter-claim in the face of evidence on the record that the defendant closed

the shop on 10th August, 2010 after which the defendant was precluded from charging any rent as the closure of the shop was found to be illegal by the trial Judge.

The counter-claim on page 46 of the record of appeal shows that the respondent claimed outstanding rentals in the sum of $2,713.45 for the period May 2009 to 16th November 2010 less the security deposit paid by the appellant together with storage charges since the appellant never collected his property. During trial, PW1 did not disclose when he stopped trading. DW1's testimony was that the appellant stopped trading in November, 2010 and he was not cross examined on the issue. The inventory by the respondent was only conducted in December, 2010, according to the defence witnesses. PW1 testified that at that date the shop was closed, he was up to date with rentals. The last payment on the statement by the respondent on page 303 of the record of appeal shows that the appellant's last payment was made on 16th November, 2010. The payment is evidenced by the receipt on page 227 of the record of appeal, as having been made on 16th November, 2010. The letter on page 231 of the record to the appellant shows that when the November, 2010 payment was made it was remitted along with the request to shift to a shop downstairs. This is the same period the appellant claims the shop was closed by the respondent. There is sufficient evidence that he stopped trading in November, 2010 and not August, 2010. Consequently, the contention by the appellant

that the respondent closed the shop on 10th August, 2010 is not supported by evidence on record.

Thus ground ten equally lacks merit and is dismissed.

The appeal having partially succeeded, we award costs of the appeal to the appellant, to be taxed failing agreement.

Delivered at Lusaka the 25th day of April 2018

C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y SICHINGA
COURT OF APPEAL JUDGE